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No. 06-____

IN THE

Supreme Court of the United States

SERGIO BANDA-ORTIZ,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit (now joined by the United States Court of Appeals for the Fourth Circuit) correctly held, in direct conflict with the United States Courts of Appeals for the Third, Eighth, Ninth, and Eleventh Circuits, that a timely-filed motion to reopen removal proceedings before the Board of Immigration Appeals does not toll an alien's previously-established voluntary-departure period, such that a grant of voluntary departure will virtually always require the forfeiture of an alien's statutory right to seek reopening of the removal proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Sergio Banda-Ortiz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the Immigration Judge ("IJ") (Pet. App. 28a-31a) and the orders of the Board of Immigration Appeals ("BIA") (Pet. App. 25a-27a; 32a-33a) are unreported.

The divided opinion of the United States Court of Appeals for the Fifth Circuit is reported at 445 F.3d 387 (Pet. App. 8a-24a). The Fifth Circuit's order denying rehearing and rehearing *en banc* and the accompanying dissent of Judge Smith, joined by Chief Judge Jones and Judges Benavides, Stewart, and Dennis from the denial are reported at 458 F.3d 367 (Pet. App. 6a-7a).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on March 28, 2006. Pet. App. 8a-24a. The Court of Appeals' order and opinion denying Mr. Banda-Ortiz's petition for rehearing *en banc* was issued on July 26, 2006. Pet. App. 6a-7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The principal statutory provisions involved are 8 U.S.C. § 1229a and 8 U.S.C. § 1229c; the principal regulations involved are 8 C.F.R. § 1003.2 and 8 C.F.R. § 1240.26 and, all of which are set out in the Appendix to this petition. Pet. App. 1a-5a.

STATEMENT OF THE CASE

In several provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (amended by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302

(2005)), Congress created statutory rights for aliens facing removal to seek authorization to depart this country voluntarily and also to move to reopen their removal proceedings in light of newly-obtained evidence. In many instances, an alien will seek to do both.

Until the decision of the Fifth Circuit's panel in this case, every federal court of appeals to address whether Congress intended to permit an alien to exercise both statutory rights, by tolling the usually very short voluntary-departure period while a motion to reopen is pending, held that federal law requires such tolling. Since the panel's decision, the Fourth Circuit has joined the Fifth Circuit in deepening the split on this issue. Thus, at present, four courts of appeals have held that a timely-filed motion to reopen removal proceedings before the BIA tolls an alien's previously-established voluntary-departure period, while two courts of appeals, including the Fifth Circuit, have reached the exact opposite conclusion. As explained by the dissent from the denial below of rehearing *en banc*, this circuit split is particularly troubling given that the Fifth Circuit has "one of the largest immigration dockets" and "the importance of uniformity of federal law and consistency in enforcement of immigration laws." Pet. App. 6a-7a.

A. Statutory Background

The interaction of several statutory and regulatory provisions is at issue in this case. Congress has provided that, rather than face removal, an alien may request to be allowed to depart voluntarily: "The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. § 1229c(a)(1). Under the currently-effective statute, such a voluntary-departure period is short in duration. "Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days." *Id.* § 1229c(b)(2). Moreover, failure to depart the country within the time allowed for voluntary departure

renders an alien ineligible for ten years for cancellation of removal. *Id.* § 1229c(d); *see also* 8 C.F.R. § 1240.26(a).

In another section of IIRIRA, Congress has also provided aliens with a statutory right to seek to reopen removal proceedings before the BIA: "An alien may file one motion to reopen proceedings." 8 U.S.C. § 1229a(c)(6)(A). "[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." *Id.* § 1229a(c)(7)(C)(i). The BIA's implementing regulations further provide that if an alien leaves the country within the period allowed for voluntary departure, he forfeits any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

B. Immigration Proceedings Below

Sergio Banda-Ortiz, a citizen of Mexico, entered the United States in 1989. Pet. App. 8a. More than a decade later, in March 2000, he was charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. Pet. App. 8a. Mr. Banda-Ortiz conceded removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1)(D), given the "exceptional and extremely unusual hardship" of separating him from his family, which includes his two children who are United States citizens. Pet. App. 8a. In the alternative, Mr. Banda-Ortiz requested voluntary departure under 8 U.S.C. § 1229c(b)(1)(D). Pet. App. 8a.

The IJ denied cancellation of removal, but granted Mr. Banda-Ortiz's request for voluntary departure. Pet. App. 8a. The BIA affirmed and granted him thirty days to depart the country voluntarily. Pet. App. 8a-9a. Rather than departing immediately, Mr. Banda-Ortiz moved to reopen his removal proceedings to introduce substantial new evidence of hardship to his family that would result from his departure. Pet. App. 9a. The BIA granted the motion to reopen and remanded the case to the IJ for consideration of this new evidence. Pet. App. 9a. On remand, however, the IJ, *sua*

sponte, found that Mr. Banda-Ortiz was ineligible for cancellation of removal under 8 U.S.C. § 1229c(d) because he had failed to voluntarily depart the country during the 30-day period previously established by the BIA. Pet. App. 9a. The BIA subsequently affirmed the IJ's decision, and held that it had erred in initially granting the motion to reopen. Pet. App. 9a. Proceeding *pro se*, Mr. Banda-Ortiz filed a timely Petition for Review in the Court of Appeals for the Fifth Circuit.

C. The Panel Decision Below

On appeal, a divided panel of the Court of Appeals for the Fifth Circuit held that a timely-filed motion to reopen does not toll an alien's voluntary-departure period. The panel found that since "[v]oluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government," it is appropriate for the alien to incur the cost of forfeiting his right to move to reopen removal proceedings if he does not depart during a previously-established voluntary-departure period. Pet. App. 11a-12a. The panel also determined that it had no authority to extend the statutory "limits on the length" of voluntary departure periods, reasoning that "tolling would effectively extend the validity of [Mr. Banda-Ortiz's] voluntary departure period well beyond the sixty days that Congress has authorized" and that "a judicial extension of the period of voluntary departure" would conflict with federal regulations reposing the authority to change departure deadlines with the executive branch. Pet. App. 13a. The panel thus "decline[d] to read into 8 U.S.C. § 1129c(d) the requirement that the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." Pet. App. 14a.

Judge Jerry E. Smith dissented, emphasizing that "the reasons offered by the majority cannot overcome the 'high hurdle' of preserving uniformity of the circuits," and noting the potential "mischief caused by [the] panel majority's decision." Pet. App. 15a; 23a. Judge Smith explained that

by refusing to "defer[] to the accumulated wisdom of our sister circuits," Pet. App. 24a, the panel opinion conflicts with existing opinions of all other federal courts of appeals to have considered the issue. *See Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005). These courts have all held that tolling of the voluntary-departure period while a timely motion to reopen is pending is necessary to "avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the [congressional] purposes of the [relevant] statutory provisions." *Azarte*, 394 F.3d at 1289.

Judge Smith thus embraced the approach taken by the other federal circuits at that point to have addressed the issue that tolling "accords with all of Congress's objectives in IIRIRA. It preserves the right of all removable aliens to file a single, good-faith motion to reopen after a final adjudicative order of the BIA. It also allows aliens to seek voluntary departure without fear of surrendering other avenues of procedural relief." Pet. App. 19a-20a. Judge Smith also noted that the rule adopted by the panel majority is "harsh" as it "operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure." Pet. App. 18a.

D. The Fifth Circuit's Denial of Rehearing *En Banc*

On April 17, 2006, represented by *pro bono* counsel, Mr. Banda-Ortiz moved for rehearing *en banc* of the panel's decision. On April 20, 2006, the Fifth Circuit requested a response to the petition, which the Government filed on June 15, 2006.

On July 26, 2006, the Fifth Circuit denied the petition for rehearing and rehearing *en banc*. Pet. App. 6a-7a. Judge Smith, joined by Chief Judge Jones and Judges Benavides, Stewart, and Dennis, dissented. Pet. App. 6a-7a. The

dissent emphasized that the panel's decision created a split between the federal courts of appeals. "The panel was split, and at the time when the majority and dissenting opinions were filed, the only circuits to have considered the issue had ruled for the alien. While this case was pending on petition for rehearing en banc, yet another circuit joined that list. *See Ugokwe v. United States Attorney General*, [453 F.3d 1325 (11th Cir. 2006)]." Pet. App. 7a.

The dissent also observed that the circuit split is particularly troubling on this issue given that the Fifth Circuit has "one of the largest immigration dockets" and "the importance of 'uniformity of federal law and consistency in enforcement of immigration laws.'" Pet. App. 7a (quoting *Renteria-Gonzales v. INS*, 322 F.3d 804, 814 (5th Cir. 2002)).

Mr. Banda-Ortiz now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three reasons:

First, the courts of appeals are split 4-2 on whether a timely-filed motion to reopen proceedings before the BIA tolls an alien's previously-established voluntary-departure period, with the majority holding that such tolling is required to give meaningful effect to all of the relevant provisions of the immigration laws. This Court's intervention is necessary to resolve the conflict among the courts of appeals.

Second, this case raises an important and recurring question of immigration law, an area of law that this Court has identified as in particular need of national uniformity. Indeed, the precise question in this case is of exceptional national importance—whether aliens will be treated uniformly with regard to their statutory rights to seek both voluntary departure and reopening of removal proceedings, or whether those aliens within the jurisdiction of two courts of appeals will be unable to avail themselves of the statutory

right to reopen and thus will be treated more harshly than aliens in the rest of the country.

Third, the erroneous decision below is inconsistent with the text of the relevant statutory provisions and is plainly contrary to congressional intent. Instead of harmonizing the relevant provisions of the immigration laws, the decision below erroneously renders certain of those provisions devoid of any meaningful effect.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT ON WHETHER A TIMELY FILED MOTION TO REOPEN TOLLS AN ALIEN'S VOLUNTARY-DEPARTURE PERIOD

This case presents this Court with a well-developed 4-2 conflict between the courts of appeals, which are now deeply split on whether a timely filed motion to reopen tolls an alien's voluntary-departure period. In well-reasoned and thorough opinions, four courts of appeals, the Third, Eighth, Ninth, and Eleventh Circuits, have held that federal law requires such tolling. *See Kanivets*, 424 F.3d 330; *Sidikhouya*, 407 F.3d 950; *Azarte*, 394 F.3d 1278; *Ugokwe v. United States Attorney General*, 453 F.3d 1325 (11th Cir. 2006).[1] On the other hand, the Fifth Circuit's panel majority as well as the Fourth Circuit have explicitly disagreed with these decisions. Pet. App. 6a-7a (emphasizing the then 4-1 split (now 4-2), in the courts of appeals); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006). This 4-2 conflict is squarely presented and ripe for this Court's immediate resolution.

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[1] The Seventh Circuit, without deciding the issue, has noted the depth of the current split and explained that "several of our sister circuits" have allowed tolling while a motion to reopen was pending. *Hadayat v. Gonzales*, 458 F.3d 659, 664 (7th Cir. 2006) (citing *Kanivets*, *Sidikhouya*, *Ukogwe*, and noting disagreement by *Banda-Ortiz*).

The Fifth Circuit's decision conflicts with the Ninth Circuit's decision in *Azarte*, 394 F.3d 1278. There, the Ninth Circuit exhaustively examined the history of motions to reopen, which allow aliens to present new information relevant to their immigration proceedings, and of the voluntary-departure procedure, which reduces deportation costs and provides aliens with a "mechanism . . . to leave the country without being subjected to the stigma or bars to future relief that are part of the sanction of deportation." *Id.* at 1283-84. In reviewing the statutory scheme "as a whole," the court concluded that failure to toll the voluntary-departure period while a motion to reopen is pending "deprives the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure." *Id.* at 1288. The court found that tolling, by contrast, "would effectuate both statutory provisions. IJs and the BIA could still grant voluntary-departure periods of up to 60 days only, but then, if that period were tolled, they would retain the authority Congress intended: to determine one non-frivolous motion to reopen." *Id.* Finally, the court found "absurd the proposition that Congress, while expressly codifying the tradition of motions to reopen, intended *sub silentio* to preclude their availability in a significant number of cases, likely a substantial majority." *Id.* at 1289; *see also Barroso v. Gonzales*, 429 F.3d 1195, 1205-06 (9th Cir. 2005) (reaffirming *Azarte* and holding that tolling is automatic even where an alien does not request a stay of removal).

The Fifth Circuit's decision also conflicts with the Eighth Circuit's decision in *Sidikhouya*, 407 F.3d 950, where the Eighth Circuit adopted the Ninth Circuit's decision in *Azarte*. There, the court agreed that without tolling, "the large class of aliens who are granted voluntary departure are functionally deprived of their statutory right to file a motion to reopen." 407 F.3d at 952. Thus, "[t]o give effect to both the voluntary departure and motion to reopen statutes," the Eighth Circuit adopted *Azarte*'s rule that "when a motion is

filed within the voluntary departure period," it "is tolled during the time the BIA is considering the motion to reopen." *Id.*

The Fifth Circuit's decision also conflicts with the Third Circuit's decision in *Kanivets*, 424 F.3d 330. There, the Third Circuit adopted the reasoning of the Ninth Circuit's decision in *Azarte* and of the Eighth Circuit's decision in *Sidikhouya*, and held that because Kanivets "timely filed his petition for reopening, the BIA should decide his motion to reopen on the merits." *Id.* at 336. The court emphasized that any other interpretation creates a "Catch-22" situation and agreed with *Azarte* that it was "absurd to believe that Congress, in providing for petitions to reopen, would intend to preclude their adjudication by invocation of the voluntary departure limitation." *Id.* at 334-35.

The Fifth Circuit's decision also conflicts with the Eleventh Circuit's recent decision in *Ugokwe*, 453 F.3d 1325. Deciding the case while the petition for rehearing *en banc* was pending in the Fifth Circuit, the Eleventh Circuit adopted "the rationale of Judge Smith and the Third, Eighth, and Ninth Circuits." *Id.* at 1330. Explicitly disagreeing with the Fifth Circuit's panel majority, the court explained that "[b]ecause Ugokwe's case clearly involves both the voluntary departure and motion to reopen statutes, we cannot, as did the Fifth Circuit, exclusively focus on the voluntary departure standards and ignore the motion to reopen provisions." *Id.* The Eleventh Circuit reasoned that the interpretation adopted by the BIA and the Fifth Circuit would place Ugokwe in an untenable position: "If the alien leaves during her voluntary departure period, she forfeits her motion to reopen . . . .Yet, if she stays she would have then violated the voluntary departure period and therefore would be ineligible to obtain the relief sought in her motion to reopen." *Id.* at 1331. Accordingly, the Eleventh Circuit concluded that such "interpretation creates an exception to Congress's clearly stated language in 8 U.S.C. § 1229a(c)(7), which grants aliens the right to file one motion to reopen,

with no mention of an exception for those in a period of voluntary departure." *Id.* Thus, "[t]o accept the BIA's position here would deprive a petitioner in Ugokwe's circumstance of all of the statutory rights granted to her by Congress." *Id.*

The Fifth Circuit's decision is, however, consistent with the recent decision of the Fourth Circuit in *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006). There, the Fourth Circuit held that the relevant statutory provisions "clear[ly and] explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits." *Id.* at 504. Disagreeing with the Ninth Circuit's approach in *Azarte*, the court emphasized "the well-established canon of statutory construction that 'a specific statutory provision controls a more general one.'" *Id.* at 505. The court noted that "[t]he voluntary departure provision applies to *certain* removable aliens, *i.e.*, those 'not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B),' while the motion to reopen provision applies to *all* aliens subject to removal." *Id.* at 505-06. Thus, the court reasoned that the "apparent conflict" referenced in *Azarte* does not exist because "the more specific voluntary departure provision governs in those limited situations in which it applies." *Id.* at 506. The court further explained that its interpretation "gives effect to both provisions" because "[a] motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request." *Id.* The court also defended the equities of its interpretation: "Because voluntary departure is a privilege that is only available to a subset of removable aliens, it is neither 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen." *Id.* The court also noted its concern that "the *Azarte* approach . . . would have the effect of rendering the time limits for voluntary departure meaningless." *Id.*

In light of these cases, the conflict on this question is well-developed: Courts of appeals on both sides of the issue have carefully examined the relevant statutory provisions, and have engaged a variety of interpretive tools to ascertain the correct rule. They have also thoroughly scrutinized and responded to the reasoning of the courts and judges on the other side of the split. Nothing would be gained from further percolation in the lower courts. At this point, this Court's immediate intervention is necessary to restore national uniformity to the administration of the immigration laws and this case is an ideal vehicle for doing so.

II. THE QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE, AFFECTING THE UNIFORM ADMINISTRATION OF THE NATION'S IMMIGRATION LAWS AND AFFECTING A SUBSTANTIAL NUMBER OF IMMIGRATION CASES

The question presented involves a question of great national importance and affects a substantial number of immigration cases. That six courts of appeals have decided this question, and another has noted the split, *see* note 1, *supra*, within less than two years of the first opinion addressing the question (the Ninth Circuit's opinion in *Azarte*), confirms its present-day importance and recurrence. Accordingly, this Court's intervention is now necessary to resolve the split and to ensure that the immigration laws are uniformly administered throughout the United States. Moreover, the proposed immigration legislation that has been pending in Congress would not affect this case and does not diminish the importance or timeliness of the question presented.

A. Uniformity Is Imperative In Administering The Immigration Laws Throughout The Nation

This Court has made clear that the immigration laws governing access into the country as a whole should be uniformly interpreted and administered because of "the

Nation's need to speak with one voice in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001) (adopting, "for the sake of *uniform* administration in the federal courts," as "reasonable" a six-month period for detention of aliens under a final order of removal, following a 90-day statutory "removal period," after which they can challenge their detention) (emphasis added). This Court's "one voice" requirement recognizes that immigration policy affects our relations with other nations and thus it must, like other aspects of foreign policy, be exercised uniformly by the federal government. *Compare Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) (noting "the concern for *uniformity* in this nation's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place") (emphasis added) (internal quotations omitted), *with* U.S. CONST. ART. I, § 8, cl. 4 ("The Congress shall have the power . . . to establish a *uniform* rule of Naturalization.") (emphasis added). As such, the federal courts of appeals have recognized that avoiding "circuit splits" is particularly critical in this area of the law given "the importance of uniformity of federal law and consistency in enforcement of immigration laws." Pet. App. 7a (quoting *Renteria-Gonzales v. INS*, 322 F.3d 804, 814 (5th Cir. 2002)); *see also Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (en banc) (avoiding a circuit split on an immigration issue and noting that "[n]ot only does our conclusion today help heal an intercircuit split, it also will help achieve nationwide uniformity in an area of the law where uniformity is particularly important").[2]

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[2] *See also Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (noting "the interests of nationwide uniformity [in the administration of immigration laws]"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (recognizing "the need for uniformity in the immigration context"); *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National

The circuit split created by this case potentially affects a significant percentage of all cases before the courts of appeals. As a preliminary matter, over the past several years "the U.S. Courts of Appeals have seen a dramatic increase in immigration cases. More people than ever before are petitioning the courts to review decisions of the Board of Immigration Appeals. . . . The result is that the courts of appeals are receiving about five times as many petitions for review today as they did before 2002." John R.B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3-4 (2005). In 2005 alone, appeals of BIA decisions "increased 14 percent to 12,349," which made these cases nearly 2 percent of the entire caseload of the federal courts of appeals. *Judicial Business of the United States Courts 2005*, *available at* http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf (last visited Sept. 28, 2006).

In light of the split on the question presented by this case, the disuniform access that individual litigants will have to judicial resources is very significant. It is widely known, and was recognized by the several judges dissenting from denial of rehearing *en banc* in this case, that the Fifth Circuit and the Ninth Circuit, the leaders of the two sides of the split, handle a large percentage of immigration cases in the country. Pet. App. 7a (emphasizing that the Fifth Circuit has "one of the largest immigration dockets"); *see also* Marcia Coyle, "*Court Paralysis Warned if Federal Budget Frozen*,"

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uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen."); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910-11 (9th Cir. 2004) (relying on "the presumption that [immigration] laws should be interpreted to be nationally uniform").

FULTON CTY. DAILY REP., Nov. 15, 2004 (identifying the Fifth and Ninth Circuits' "huge influx of immigration appeals" as one of the significant "caseload problems" facing our federal appellate courts).

The circuit split in this area of law is particularly troubling because, as Ninth Circuit Judge Carlos Bea, has noted, it will lead to "forum shopping." *Hearing Before the United States Senate Judiciary Comm. on the Judicial Review of Immigration Matters*, 109th Cong. 7-9 (2006) (observing the significantly more favorable legal regime toward aliens in the Ninth Circuit and noting that "[i]f I were representing one of my old clients, I would do everything in the world to have them given up and proceed in the 9th Circuit rather than in the 5th Circuit"). This result is antithetical to the goals of "one voice" in and uniform administration of our nation's immigration laws. *See Zadvydas*, 533 U.S. at 701.

B. Aliens Throughout The Country Should Enjoy The Same Statutory Rights

The question presented has wide-spread and serious consequences for a substantial number of aliens in the Fifth and Fourth Circuits, who will be unable to avail themselves of their statutory right to reopen and thus will be treated differently and more harshly than aliens in the rest of the country. *See* Pet. App. 6a (Smith, J., joined by Jones, C.J., Benavides, Stewart and Dennis, J.J., dissenting)] ("The question raised here . . . affects a large number of aliens in this circuit and elsewhere."). Such aliens have been placed in a "Scylla and Charybdis" dilemma, by making them select between foregoing voluntary departure entirely and seeking voluntary departure, which, if granted, would in most circumstances forfeit their rights to petition to reopen their immigration proceedings to seek cancellation of removal. Pet. App. 23a. Indeed, as Judge Smith noted, "one predictable consequence of today's decision . . . is that the immigration bar will hesitate before requesting voluntary departure because of the now-heightened risk that a

successful request will result in the automatic denial of all forms of discretionary relief." Pet. App. 23a. But such reluctance would undercut the benefits of voluntary departure that the panel majority itself stressed, such as saving judicial and agency resources in ensuring deportation.

Thus, this Court's review is warranted to establish uniformity in immigration laws throughout the United States and to ensure that immigrants in the Fifth and Fourth Circuits enjoy the same rights as immigrants in the rest of the country.

C. The Proposed Immigration Legislation Does Not Diminish The Importance Of The Question Presented

Before the Fifth Circuit, the Government relied upon the proposed immigration legislation as a reason to deny rehearing *en banc*. However, it is plain at this point that the proposed legislation does not affect the importance of the question presented both because it is unlikely that any immigration legislation will be enacted in the near future and because the proposed legislation would not immediately take effect and would have only prospective application.

First, it is unlikely that any immigration legislation will be passed in the near future. *See* David Nather, *GOP Sees Best in Stuffed Agenda*, CQ WEEKLY, Sept. 4, 2006, at 2300 ("An immigration overhaul is languishing . . . and there is little appetite for striking a deal before the election."); Fred Hiat, *How to Save Immigration Reform*, WASH. POST, June 26, 2006, at A21 ("Any bill 'comprehensive' enough to satisfy the Senate is unlikely to pass muster in the House; anything draconian enough for the House can't win 60 votes in the Senate."). Further casting doubt on the likelihood of these bills becoming law, lawmakers have announced that "rather than having a conference with the Senate to negotiate compromise legislation, [Congress] would hold another round of hearings." Dana Milbank, *It's Time to Cut and Run From "Cut and Run,"* WASH. POST, June 21, 2006, at A2;

see also Jonathan Weisman and Shailagh Murray, *GOP Plans Hearings on Issue of Immigrants; Field Sessions May Delay Talks on Hill*, WASH. POST, June 21, 2006, at A1 (noting that lawmakers "have largely given up on passing a broad rewrite of the nation's immigration laws this year").

Second, the pending legislative proposals would not directly affect this case, and would not affect any of the thousands of pending cases implicated by the question presented or any cases that arise until well after compromise legislation were enacted. At present, there are differing immigration bills passed that would need to be resolved in a conference that has neither taken place nor been scheduled, and which contain language relevant to the question presented in this petition. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2006). These bills contain provisions that would amend 8 U.S.C. § 1229c (governing voluntary departure) and set the timing for the legislation to take effect.

The substantive provision states as follows:

> VOLUNTARY DEPARTURE PERIOD NOT AFFECTED- Except as expressly agreed to by the Secretary in writing in the exercise of the Secretary's discretion before the expiration of the period allowed for voluntary departure, no motion, appeal, application, petition, or petition for review shall affect, reinstate, enjoin, delay, stay, or toll the alien's obligation to depart from the United States during the period agreed to by the alien and the Secretary.

Notably, the "effective date" provision states that the legislation would not go into effect until 180 days *after* the bill's enactment by Congress:

> The amendments made by this section shall apply with respect to all orders granting voluntary departure under section 240B of the Immigration and Nationality Act (8 U.S.C. 1229c) made *on or after the date that is 180 days after the date of the enactment of this Act.*

S. 2611, 109th Cong., § 211(c)(1) (emphasis added); *see also* H.R. 4437, 109th Cong., § 208(d)(1).

Thus, while this proposed language is potentially relevant to future claims of tolling of an alien's voluntary-departure period, the legislation by its own terms would not affect this case or any other case where voluntary departure was granted before the enactment of the bill or during the 180-day period after its enactment. Federal statutes do not generally apply retroactively unless Congress "has expressly prescribed the statute's proper reach," *Martin v. Hadix*, 527 U.S. 343, 352 (1999) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). In light of the pending legislation's provision that it would not become effective until 180-days after its enactment, it is plain that it would not apply to this or the thousands of other pending cases affected by the question presented. *See, e.g.*, Pet. App. 8a (noting that Banda-Ortiz received his grant of voluntary departure on August 22, 2002).

III. THE FIFTH CIRCUIT'S DECISION IS PLAINLY WRONG BECAUSE IT CONFLICTS WITH BOTH THE LANGUAGE OF THE RELEVANT STATUTES AND WITH CONGRESSIONAL INTENT

A. The Decision Below Is Inconsistent With The Plain Language Of The Immigration Statutes

The decision below is inconsistent with the relevant statutory language. "The starting point for [the] interpretation of a statute is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). "When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, . . . and give to it such a construction as will carry into execution the will of the Legislature." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (internal quotation marks and citation omitted). Analysis of the statutory language demonstrates that the interpretation of the majority of the federal appellate courts to have considered the question presented is correct and that the interpretation of the Fifth Circuit below and the Fourth Circuit is erroneous.

First, the only interpretation that gives full meaning and effect to all of the relevant statutory provisions is one that requires tolling of the voluntary-departure period while a motion to reopen is pending. It has long been considered a "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that it is a court's duty "'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Thus, "[a] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971);

see also Wash. Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). Accordingly, this Court is "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995); *see also Vimar Seguros y Reasuguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 533 (1995) ("[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (internal quotation marks omitted).

The relevant statutory language here makes plain that aliens have the rights both to seek voluntary departure *and* to seek reopening of their immigration proceedings. On the one hand, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense . . . ." 8 U.S.C. § 1229c(a)(1). "Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days." *Id.* § 1229c(b)(2). Failure to leave the country within the time allowed for voluntary departure renders an alien ineligible for ten years for cancellation of removal. *Id.* § 1229c(d); *see also* 8 C.F.R. § 1240.26(a). On the other hand, "[a]n alien may file one motion to reopen proceedings." 8 U.S.C. § 1229a(c)(6)(A). "[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." *Id.* § 1229a(c)(7)(C)(i). The BIA regulations state that if an alien leaves the country within the period allowed for voluntary departure, he forfeits any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

The only plausible way to reconcile these provisions to preserve *both* statutory rights is to construe these provisions to require tolling of any applicable voluntary-departure period while an alien's motion to reopen proceedings is pending. As Judge Smith recognized, only a tolling rule

"accords with all of Congress's objectives in IIRIRA." Pet. App. 19a. A tolling rule "would effectuate both statutory provisions. IJs and the BIA could still grant voluntary-departure periods of up to 60 days only, but then, if that period were tolled, they would retain the authority Congress intended: to determine one non-frivolous motion to reopen." *Azarte*, 394 F.3d at 1288.

By contrast, the Fifth Circuit panel's contrary ruling does not give effect to all of the relevant statutory provisions. "[A]n alien who does *not* leave the United States within his voluntary departure period is not eligible for an adjustment of status, but an alien who *does* leave the country within his voluntary departure period forfeits any pending motion to reconsider or reopen which the BIA has not yet decided." *Barroso*, 429 F.3d at 1201 (emphasis in original). As a result, "[e]ither way, stay or go," under the panel's interpretation here, aliens would be "precluded from obtaining a ruling on the merits of their properly filed, timely motion to reopen." *Azarte*, 394 F.3d at 1282; *Ugokwe*, 453 F.3d at 1331 (same). The Fifth Circuit's panel's decision is thus erroneous.

Second, an interpretation requiring tolling is necessary to comply with the canon of statutory construction that ambiguities in immigration statutes must be resolved "in favor of [an alien] because deportation is a drastic measure and at times the equivalent of banishment or exile . . . . To construe [a] statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (internal citation omitted). This canon has been repeatedly applied in this Court's cases involving immigration laws. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (noting that it is a "'longstanding principle of statutory construction [that] any ambiguities in deportation

statutes [should be construed] in favor of the alien.") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. INS*, 376 U.S. 120, 128 (1964) (same).

In this case, the narrowest and most favorable reading of the statutory language is to permit aliens to meaningfully exercise their statutory rights both to seek voluntary departure *and* to seek reopening of their immigration proceedings. In contrast, the Fifth Circuit's decision below would prevent "aliens from receiving decisions on their motions to reopen [and] would eliminate" in cases such as this "all possibility of redress if their circumstances changed," *see Azarte*, 394 F.3d at 1289. Such an approach limits an alien's freedom in severe ways and penalizes an alien who seeks to exercise fully the statutory rights explicitly granted by Congress. If Congress had intended such a harsh result, "it would have said so." *Id.* The plain language of the relevant statutory provisions does not mandate that result, and the decision below has improperly required such a result in derogation of the pertinent rules of statutory construction.

Third, the contrary justifications of the Fifth Circuit below and the Fourth Circuit are unpersuasive. To begin with, the Fifth Circuit panel's concern that tolling could be viewed as contrary to the statutory "limits on the length" of the "voluntary departure" period, Pet. App. 12a; *see also Dekoladenu*, 459 F.3d at 506 (expressing the same concern), is not valid. As Judge Smith noted, courts must "presume the availability of tolling against the government unless Congress provides otherwise." Pet. App. 22a. Indeed, "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this

background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002). Therefore, tolling is not contrary to the statutory time limits on voluntary departure:

> [T]olling does not *extend* the amount of time granted for voluntary departure. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "toll" as "to stop the running of" a time period and an "extension" as "[a] period of additional time to take an action"). "A suspension of a voluntary departure period merely tolls the running of that period; it does not extend it." *Bocova v. Gonzales,* 412 F.3d 257, 269 (1st Cir. 2005); *see also Desta[v. Ashcroft,* 365 F.3d 741, 747 (9th Cir. 2004)] ("[W]hile we are stopping the clock from running on the time petitioner has to depart voluntarily, we are not adding more time to that clock.").

Barroso, 429 F.3d at 1206 (emphasis and alterations in original). Thus, the Fifth and the Fourth Circuits' rejection of tolling, based solely on the statutory language providing a specific length of the voluntary-departure period, is legally incorrect.

Moreover, the Fourth Circuit's reliance on the canon of statutory construction that "a specific statutory provision controls a more general one," *Dekoladenu*, 459 F.3d at 505-06, is misplaced here for two reasons. To begin with, the specific-trumps-general canon does not apply unless two statutory provisions are actually in an "irreconcilable" conflict: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Thus, any "intention of the legislature to repeal [a prior provision] must be clear and manifest." *Id.*

For example, in *Morton*, the Court found no conflict between an Indian-preference statute for Bureau of Indian Affairs hiring and the Equal Employment Opportunities Act (EEOA), which generally bans racial discrimination by the federal government. The Court held that, in light of "the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians," "[a] provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race." *Id.* at 550.

Rather, a legislative act may be nullified where a conflict is plainly irreconcilable. Thus, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court held that a construction of a dam would have led to "eradication" of an endangered species, the snail darter, and thus, the dam could not be completed in the face of the Endangered Species Act ("ESA"), which commands all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species." *Id.* at 173. Because the ESA's "language admit[ted] of no exception," it was impossible "to regard each [statute] as effective." *Id.* at 184, 190.

In this case, however, there is no conflict, let alone an "irreconcilable" one, between the "congressional enactments" addressing voluntary departure, 8 U.S.C. § 1229c(a)(1), and motions to reopen, 8 U.S.C. § 1229a(c)(6)(A). *See Morton*, 417 U.S. at 551. These provisions plainly govern *different* conduct in a way that may be reconciled. Voluntary departure procedures presuppose the finality of the determination of the alien's status and establish a procedure for effectuating the departure. By contrast, provisions addressing reopening proceedings before the BIA set forth the options and procedures for *continuing litigation* over an alien's

immigration status, and have nothing to do with departure. 8 U.S.C. § 1229a(c)(6)(A). Thus, the provisions address distinct subject matters and different stages of an alien's immigration proceedings. It is only through a BIA regulation, 8 C.F.R. § 1003.2(d), under which voluntary departure forfeits a motion to reopen, that any tension is created. This tension, moreover, is not a "conflict," because it can be easily reconciled by allowing tolling, as the majority of the courts of appeals have concluded. Accordingly, the Fourth Circuit, like the majority of circuits, should have sought to make the two statutory provisions "capable of co-existence," rather than creating an avoidable conflict and then "choosing" the more "specific" one as controlling. *See Morton*, 417 U.S. at 550.

Further, in any event, the specific-trumps-general canon applies only where two statutory provisions govern the same conduct or benefit, and one provision is in fact more specific than the other. For example, in *Morton*, the Court held that the statute granting an employment preference for Indians in the Bureau of Indian Affairs is more "specific" than the EEOA, which generally forbids racial discrimination in federal government employment. 417 U.S. at 550. The statute addressing BIA hiring of Indians is plainly narrower in scope than the EEOA, a statute "of general application," and covers conduct also regulated by the EEOA. *Id.* Therefore, the Court held that the more specific BIA-related statute governed instead of the general provisions of the EEOA. *Id.*[3]

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[3] *See also Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990) (ERISA's prohibition on pension benefit alienation is more specific than the Labor-Management Reporting and Disclosure Act's provision allowing a private right of action against union officers, who breached their fiduciary duties, to recover damages "or other appropriate relief for the benefit of the labor organization"); *Warren v. North Carolina Dep't of Human Res.*, 65 F.3d 385, 390 (4th

The Fourth Circuit decided that this canon of construction was applicable because the voluntary departure provision applies only to "*certain* removable aliens, *i.e.*, those 'not deportable under Section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B),' while the motion to reopen provision applies to *all* aliens subject to removal." *Dekoladanu*, 459 F.3d at 505-06. In the first place, the voluntary departure provision is not properly characterized as "more specific" than the motion to reopen provision merely because a subset of aliens are disqualified from seeking voluntary departure. More significantly, the Fourth Circuit's reasoning misses the point of the canon of construction, which applies only to statutory provisions that govern the same conduct or benefit. As explained above, it is plain that the provisions addressing voluntary departure and motions to reopen do not govern the same conduct or benefit. The only interrelationship of those provisions has been created by BIA's regulation that if an alien leaves the country during the voluntary departure period, he forfeits any pending motion to reopen. 8 C.F.R. § 1003.2(d). This one narrow and discrete point of intersection addresses only the *effect* of an action under one provision (voluntary departure) on the action taken pursuant to a provision (motion to reopen). Thus, these provisions are wholly unlike those in *Morton v. Mancari*, for example, where both statutes governed precisely the same conduct—preferential race hiring by the federal government, but did so at different levels of generality. Nor are the provisions in

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Cir. 1995) (cited in *Dekoladenu*, 459 F.3d at 505) (a provision dealing "specifically" with valuation of automobiles is more specific than a provision on "inaccessible resources" due to liens for the purposes of an applicant's household asset calculation); *Shawnee Tribe v. United States*, 405 F.3d 1121, 1129 (10th Cir. 2005) (cited in *Dekoladenu*, 459 F.3d at 505) (a statute giving discretion to the Secretary of the Army to dispose of a particular property in question in the case is more specific than the obligations imposed by the Property Act setting forth guidelines for property conveyances).

question anything like those in *Warren* and *Shawnee Tribe*, the two cases cited by the Fourth Circuit in *Dekoladenu*. *See* n.3, *supra*. In *Warren*, both provisions addressed valuation of household income; in *Shawnee Tribe*, both provisions addressed the conveyance of property; and in each case, the more "specific" provisions plainly covered subject matter that was a subset of the subject matter covered by the more general provision. In this case, there is no such overlap.

B. The Decision Below Creates Harsh Consequences Inconsistent With Congressional Intent, As Embodied In The Statutory Scheme

The Fifth Circuit's decision is also erroneous because it creates harsh consequences by placing an alien in a Catch-22 situation, that Congress could not have intended in creating a statutory scheme allowing for *both* the right to seek voluntary departure and the right to move to reopen.

In asserting that "[v]oluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government," the panel found it appropriate for the alien to incur the tremendous cost of forfeiting his right to move to reopen his immigration proceedings if he fails to leave the country by the end of his voluntary-departure period. Pet. App. 11a; *see also Dekoladenu*, 459 F.3d at 506 (calling voluntary departure "a benefit" "only available to a subset of removal aliens"). That period, however, as Judge Smith noted, "will often come too soon for the agency to consider [a motion to reopen] on the merits." Pet. App. 17a; *see also Dekoladenu*, 459 F.3d at 504 (noting that "[a]s a practical matter, the BIA will rarely reach a decision on a motion to reopen before the end of the voluntary departure period. Thus most aliens who are granted voluntary departure have no meaningful ability to file a motion to reopen when they are seeking one of the forms of relief listed in § 1229c(d)"). But such a harsh approach makes no sense in light of the statutory scheme that provides aliens with both the right to seek voluntary departure to avoid forcible removal and the

right to move to reopen to avoid removal under any conditions.

As the Third, Eighth, Ninth, and Eleventh Circuits, as well as several judges of the Fifth Circuit, have recognized, "[t]o accept [the Fifth Circuit's] position . . . would deprive a petitioner . . . of *all* of the statutory rights granted to [petitioner] by Congress." *Ugokwe*, 453 F.3d at 1331 (emphasis added). Thus, imposing such a "Hobson's choice on aliens facing removal" makes little sense given that Congress specifically codified a right to file a motion to reopen removal proceedings, including those resulting in the grant of a request for voluntary departure, within 90 days. Pet. App. 17a. There is no reason to believe that Congress would have codified such a right "if, in a substantial number of cases, the order of removal itself would result in the forfeiture of the motion." Pet. App. 18a; *accord Sidikhouya*, 407 F.3d at 952 (an alien "must be afforded an opportunity to receive a ruling on the merits of his timely filed motion to reopen"); *Azarte*, 394 F.3d at 1288-89 (rejecting a contrary interpretation as "absurd").

Indeed, the Department of Justice ("DOJ") and BIA themselves have refused to adopt such a one-sided position. In issuing the currently-effective interim rule concerning "the effect of a motion or appeal to the Immigration Court, BIA, or a federal court on any period of voluntary departure already granted," the DOJ stated:

> the Department considered several options, but has not adopted a position . . . The Department has identified three possible options: no tolling of any period of voluntary departure; tolling the voluntary period for any period that an appeal or motion is pending; or setting a brief, fixed period of voluntary departure (for example, 10 days) after an appeal or motion is resolved.

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312-1, 10326 (March 6, 1997). "As the interim rule makes clear, [the DOJ] considers automatic tolling to be a logical resolution to the question of the interrelationship between the statute's motion to reopen/reconsider and voluntary departure provisions." *Barroso*, 429 F.3d at 1205. Importantly, "two of the three approaches being considered by the agency contemplate that an alien *always* be allowed to remain in the country until after the motion to reconsider/reopen is decided." *Id.* (emphasis in original); *see also Azarte*, 394 F.3d at 1299 n.21 (noting that "the interim rule promulgated by the Department of Justice has never been replaced by a final one").

Accordingly, the panel's decision is not only inconsistent with the language of the relevant statutes, but it also mandates an extremely harsh result that Congress could not have intended and that not even the DOJ and BIA have adopted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

8 U.S.C. § 1229a

Removal proceedings

***

(c) Decision and burden of proof

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

***

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

***

8 U.S.C. § 1229c

Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

***

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

***

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

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8 C.F.R. § 1003.2

Reopening or reconsideration before the Board of Immigration Appeals.

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(d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1240.26

Voluntary departure—authority of the Executive Office for Immigration Review.

(a) Eligibility: General. An alien previously granted voluntary departure under section 240B of the Act, including by the Service under § 1240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

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United States Court of Appeals, Fifth Circuit.

Sergio BANDA-ORTIZ, Petitioner,

v.

Alberto R. GONZALES, U.S. Attorney General, Respondent.

No. 04-61100.

July 26, 2006.

ON PETITION FOR REHEARING *EN BANC*

(Opinion May 28, 2006, 5th Cir., *Banda-Ortiz v. Gonzales*, 445 F.3d 387)

Before JOLLY, SMITH, and GARZA, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

JERRY E. SMITH, Circuit Judge, with whom JONES, Chief Judge, and BENAVIDES, STEWART, and DENNIS, Circuit Judges, join, dissenting:

I respectfully dissent from the refusal to rehear this case *en banc*. I will not reargue the merits. The parties' positions are thoroughly set forth in the panel majority and dissenting opinions. Irrespective of the individual judges' views on the merits, the court should be willing to review this important issue before creating a circuit split.

This court has one of the largest immigration dockets of any circuit. The question raised here--whether a timely filed motion to reopen tolls an alien's voluntary departure period--affects a large number of aliens in this circuit and elsewhere.

After losing in his proceedings before the Board of Immigration Appeals, Mr. Banda-Ortiz proceeded *pro se* in this court by filing a petition for review, stating in his brief that he lacked the funds to attend oral argument; because, in any event, this court rarely if ever grants argument to *pro se* litigants, the case was submitted on the briefs alone. After the matter was decided in the government's favor, the Jones Day law firm has ably represented Mr. Banda-Ortiz as *pro bono* counsel in filing a petition for rehearing *en banc*.

There are two credible sides to the question. The panel was split, and at the time when the majority and dissenting opinions were filed, the only circuits to have considered the issue had ruled for the alien. While this case was pending on petition for rehearing *en banc*, yet another circuit joined that list. *See Ugokwe v. United States Attorney Gen.*, [453 F.3d 1325 (11th Cir. 2006)].

It would be more prudent for this court, in light of the foregoing, to be willing to rehear this case *en banc*. We have emphasized the importance of "uniformity of federal law and consistency in enforcement of the immigration laws." *Renteria-Gonzalez v. INS*, 322 F.3d 804, 814 (5th Cir. 2002). There certainly may be times when we are justified in creating a circuit split, but this issue is important enough that the entire court should be willing to review it, with both sides now represented by counsel, to make sure the position taken by the panel majority is correct.

Because of the court's decision to reject *en banc* rehearing, I respectfully dissent.

United States Court of Appeals, Fifth Circuit.

Sergio BANDA-ORTIZ, Petitioner,

v.

Alberto R. GONZALES, U.S. Attorney General, Respondent.

No. 04-61100.

March 28, 2006.

Before JOLLY, SMITH, and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Sergio Banda-Ortiz petitions for review of an order of the Board of Immigration Appeals ("BIA") finding him statutorily ineligible for cancellation of removal.

Banda-Ortiz, a citizen of Mexico, entered the United States in 1989. In March 2000, the former Immigration and Naturalization Service ("INS") issued a Notice to Appear, charging him with removability under 8 U.S.C. § 1182(a)(6)(A)(I) as being present in the United States without being admitted or paroled. Banda-Ortiz conceded removability but applied for cancellation of removal, claiming that his departure would impose "exceptional and extremely unusual hardship," *see* 8 U.S.C. § 1229b(b)(1)(D), on his older son and adoptive parents, and in the alternative for voluntary departure. As a prerequisite to being granted voluntary departure, Banda-Ortiz was required to, *inter alia*, establish by clear and convincing evidence that he had the means and intent to depart from the United States. 8 U.S.C. § 1229c(b)(1)(D). The immigration judge ("IJ") denied cancellation of removal and granted Banda-Ortiz's request for voluntary departure.

Banda-Ortiz filed an appeal with the BIA. On August 22, 2002, the BIA affirmed and granted him thirty days to depart

voluntarily.[1] Rather than departing, Banda-Ortiz moved to reopen his removal proceedings to introduce new evidence of hardship to his family that would result from his departure.[2] He did not accompany this motion with a request to stay removal, to toll the voluntary departure period, or to reinstate the voluntary departure period. The BIA nevertheless granted the motion to reopen and remanded to the IJ for consideration of Banda-Ortiz's new evidence in support of his application for cancellation of removal.

After a hearing, however, the IJ held that Banda-Ortiz was ineligible to apply for cancellation of removal pursuant to 8 U.S.C. § 1229c(d) (providing that an alien who fails to depart voluntarily as scheduled is ineligible for cancellation of removal) because even though he had filed his motion to reopen prior to the expiration of the voluntary departure period, he had failed to depart timely while that motion was pending. The BIA affirmed. It agreed that 8 U.S.C. § 1229c(d) rendered Banda-Ortiz ineligible for cancellation of removal, rejected Banda-Ortiz's argument that filing a motion to reopen tolls the voluntary departure period, and held that it (the BIA) had erred in initially granting the motion to reopen.

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[1] As required by 8 U.S.C. § 1229c(d)(3), the BIA's decision concluded with the following notice:

If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

[2] *See* 8 U.S.C. § 1229a(c)(7) (permitting an alien to file one motion to reopen). Although Banda-Ortiz filed his motion on September 23, 2002, two days after his voluntary departure period expired, the INS granted a two-day *nunc pro tunc* extension, thereby rendering the motion timely.

II

We have jurisdiction to review the BIA's denial of a motion to reopen under 8 U.S.C. § 1252. *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005). We review for an abuse of discretion. *Id.*

This case concerns the interaction of several statutory provisions and an administrative regulation concerning voluntary departure and motions to reopen. With respect to voluntary departure, 8 U.S.C. § 1229c(a)(1) allows the Attorney General to permit an alien to voluntarily depart the United States at the alien's expense. "Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days." 8 U.S.C. § 1229c(b)(2). To ensure that aliens abide by their obligation to voluntarily depart, 8 U.S.C. § 1229c(d) provides:

> If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien
>
> (A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
>
> (B) shall be ineligible, for a period of 10 years, to receive [cancellation of removal].

The statute concerning motions to reopen states, "An alien may file one motion to reopen proceedings." 8 U.S.C. § 1229a(c)(6)(A). That motion must be filed within ninety days of the date of the final administrative order. 8 U.S.C. § 1229a(c)(6)(C)(i). Finally, 8 C.F.R. § 1003.2(d), provides that "[a]ny departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

The BIA held that because he had overstayed his voluntary departure date, Banda-Ortiz was in violation of 8 U.S.C. § 1229c(d) and was ineligible for cancellation of

removal. Despite the clarity with which the statute speaks and his undisputed failure to depart timely, Banda-Ortiz argues that he is eligible for cancellation of removal. He contends that the BIA is required to toll automatically the voluntary departure period during the pendency of a motion to reopen. According to Banda-Ortiz, the statute and regulation placed him in an "impossible situation" because, if he complied with the voluntary departure order and left the country, his motion to reopen would be deemed withdrawn pursuant to 8 C.F.R. § 1003.2(d). If he stayed, 8 U.S.C. § 1229c(d) would render him ineligible for cancellation of removal.

In support of his argument, Banda-Ortiz relies on the Ninth Circuit's decision in *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005). The *Azarte* court noted that the BIA's reasonable interpretation of the immigration statutes are entitled to deference, as provided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Id.* at 1285. The *Azarte* court nevertheless declined to defer to the BIA's interpretation, holding instead that it would be absurd for Congress to provide an alien who elects voluntary departure with the right to file a motion to reopen when that motion would, in the vast majority of cases, be deemed withdrawn when the alien complies with the voluntary departure order. *Id.* at 1288-89 (describing this result as "nonsensical"). *See also Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005) (agreeing with *Azarte*); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005) (same). We disagree.

Voluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government. It is not granted "unless the alien requests such voluntary departure and agrees to its terms and conditions." 8 C.F.R. § 240.25(c). By requesting voluntary departure, an alien represents that he has the intent to leave the country within the specified time period. 8 U.S.C. § 1229c(b)(1)(D). Banda-Ortiz made this representation to the IJ but failed to

depart. As a result, he gained access to the numerous benefits that voluntary departure provides, including: 1) the ability to choose his own destination point; 2) the opportunity to put his affairs in order without fear of being taken into custody; 3) freedom from extended detention while the government prepares for his removal; 4) avoidance of the stigma of forced removal; and 5) continued eligibility for an adjustment of status. *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004). Voluntary departure is not, however, without cost to the alien. As noted, it exposes him to civil fines and renders him ineligible for certain forms of relief if he does not timely depart. 8 U.S.C. § 1229c(d).

The statutory scheme "reveals Congress' intention to offer an alien a specific benefit-exemption from the ordinary bars on subsequent relief-in return for a quick departure at no cost to the government." *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004). The purpose of voluntary departure is to provide an incentive to aliens "to depart without requiring the agency and courts to devote resources to the matter." *Alimi v. Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004) (holding that stay of removal does not automatically toll voluntary departure date). "But if the alien does not depart promptly, so that the [Government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here, the original benefit to the [Government] is lost." *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976). What Banda-Ortiz seeks is "the opportunity to litigate to the last without bearing the attendant costs [and] the chance of winning outright, plus benefits the law offers to those who avoid litigation through voluntary departure." *Alimi*, 391 F.3d at 892.

Furthermore, the remedy Banda-Ortiz seeks is in tension with, if not opposed to, limits on the length of and authority to extend voluntary departure. First, 8 U.S.C. § 1229c(b)(2) provides, "Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days." *See also* 8 C.F.R. § 1240.26(f) ("In no event can the total

period of time, including any extension, exceed ... 60 days as set forth in [8 U.S.C. § 1229c(b)(2)]".). Automatic tolling would effectively extend the validity of his voluntary departure period well beyond the sixty days that Congress has authorized. Second, a judicial extension of the period of voluntary departure is arguably contrary to 8 C.F.R. § 1240.26(f), which states, "Authority to extend the time in which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs."[3]

Banda-Ortiz disputes this conclusion because Congress authorized aliens to file a motion to reopen, 8 U.S.C. § 1229a(c)(7), and did not exclude aliens who elect voluntary departure from its application. The BIA has reasonably interpreted the governing statutes in light of the

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[3] *See Ngarurih*, 371 F.3d at 194 (holding that court of appeals may not toll voluntary departure period during judicial review); *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 280 (3d Cir. 2004) ("[U]nder IIRIRA, the executive branch, not the judiciary, is given the sole authority to determine when an alien must depart."); *Garcia v. Ashcroft*, 368 F.3d 1157, 1159 (9th Cir. 2004) (holding that court of appeals lacks authority to grant a motion for a stay of the voluntary departure period filed after that period has expired); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172-73 (9th Cir. 2003) ("It is executive rather than judicial officers who decide when an alien must depart. Neither the statute nor the regulations give courts any designated role in this process of setting the deadline for departure .... For us to specify in effect a different period starting more than a year later would contravene Congress's scheme and invade the executive branch's authority to specify a deadline for voluntary departure."). *But see Barroso v. Gonzales*, 429 F.3d 1195, 1206 (9th Cir. 2005) (holding that "tolling" the voluntary departure period does not "extend" it, but instead merely stops its running); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 653 (7th Cir. 2004) (holding that 8 C.F.R. § 1240.26(f) only limits executive officials); *Khalil v. Ashcroft*, 370 F.3d 176, 181 (1st Cir. 2004) (same).

purposes of the voluntary departure scheme to permit the filing and resolution of a motion to reopen, so long as it does not interfere with the agreed upon voluntary departure date or the Government's interest in the finality of an alien's voluntary departure. Banda-Ortiz's interpretation, on the other hand, permits an alien to request voluntary departure, exhaust his administrative appeals, move to reopen the removal proceedings, and overstay the period of voluntary departure, thereby depriving the government of a speedy departure. "This is as if the accused in a criminal prosecution demanded not only the chance of acquittal at trial but also the benefits that go with a guilty plea and the acceptance of responsibility." *Alimi,* 391 F.3d at 892. Accordingly, we decline to read into 8 U.S.C. § 1229c(d) the requirement that the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen.

III

For the foregoing reasons, we DENY the petition for review.

JERRY E. SMITH, Circuit Judge, dissenting:

The panel majority today unnecessarily creates a circuit split on an important issue of immigration law and ensures that a sizable number of aliens facing departure will be effectively unable to avail themselves of the statutory right to file one good-faith motion to reopen, regardless of the merit of their underlying claims. Because Congress could not possibly have intended this result, I respectfully dissent.

I.

We are the fourth circuit to consider this precise question: Does a timely filed motion to reopen toll an alien's voluntary

departure period?[4] We are the first to answer in the negative. Normally "we begin with trepidation in the face of the solid array of ... federal courts of appeals" that have reached the same conclusion, because "[w]e are always chary to create a circuit split." *Alfaro v. Comm'r*, 349 F.3d 225, 229 (5th Cir. 2003). Here, however, the reasons offered by the majority cannot overcome the "high hurdle" of preserving the uniformity of the circuits. *See id.* at 230.

The majority relies on two principal arguments: first, that it is sensible for aliens who receive the benefits of voluntary departure to incur the costs associated with not leaving the country in a timely fashion, and second, that courts have no authority to extend the voluntary departure period beyond the sixty days authorized by statute.[5] The majority errs by searching for Congress's intent almost exclusively in the set of provisions governing voluntary departure to the detriment of the provisions concerning motions to reopen.

In *Azarte,* the Ninth Circuit exhaustively studied the history of motions to reopen and voluntary departure, including the 1996 codification of both rights in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and concluded that tolling was necessary to "avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the purposes of the two statutory provisions." *Azarte*, 394 F.3d at 1289. In particular, before codifying 8

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[4] *See Kanivets v. Gonzales,* 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005). *See also Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005) (holding that tolling occurs even if alien fails to file a separate motion to stay removal).

[5] *See* 8 U.S.C § 1229c(b)(2); 8 C.F.R. § 1240.26(f).

U.S.C. § 1229a(c)(7), which governs motions to reopen, Congress directed the Attorney General to conduct a study on perceived abuses of these motions, and ultimately concluded that the proper way to curb abuse was (1) to limit aliens to one motion to reopen, (2) to require evidence of the factual basis for reopening, and (3) to limit to ninety days the time for filing a motion to reopen.[6]

In sum, Congress addressed the problem of proliferating motions to reopen by regulating their quantity, quality, and timeliness. Nowhere, however, did Congress suggest that an alien's traditional right to file a motion to reopen depends on the nature of the order of removal. In fact, § 1229a(c)(7)(C)(i) specifically declines to adopt this limitation, stating only that the motion to reopen shall be filed within ninety days of "*a* final administrative order of removal" (emphasis added), which includes in its terms an order granting voluntary departure.

I do not quarrel with the general proposition that voluntary departure represents a bargain struck between an alien and the government. *See* 8 C.F.R. § 240.25(c). I object, however, to limiting our search for the terms of that bargain to statutory provisions conferring benefits on only one of the parties.[7] To be sure, IIRIRA "drastically limited" the amount of time available for voluntary departure. *See Azarte*,

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[6] *See Azarte*, 394 F.3d at 1283-84; 8 U.S.C. § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings under this section[.]"); § 1229a(c)(7)(B) ("The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."); § 1229a(c)(7)(C)(i) ("[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.").

[7] *See United States v. Caldera-Herrera*, 930 F.2d 409, 411 (5th Cir. 1991) (stating that "statutes must be read in harmony with one another so as to give meaning to each provision").

394 F.3d at 1285. The *Azarte* court, however, correctly refused to read the departure statute in isolation:

> [V]oluntary departure and motions to reopen both are the subject of a long, uninterrupted, historic practice in immigration law ... We find absurd the proposition that Congress, while expressly codifying the tradition of motions to reopen, intended *sub silentio* to preclude their availability in a significant number of cases, likely a substantial majority.

Azarte, 394 F.3d at 1289.

Rather than adopt this more sensible analysis, the panel majority imposes a Hobson's choice on aliens facing removal. "Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." 8 C.F.R. § 1003.2(d). Under this section, an alien subject to forcible removal will automatically forfeit his motion to reopen once deported. Should he attempt to avoid this result by applying for voluntary departure, however, he will still forfeit his motion, under the court's analysis, if he remains in the country past his departure date (which will often come too soon for the agency to consider his motion on the merits).[8] If, on the other hand, he complies with the

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[8] Although the immigration judge ("IJ") has authority to grant up to 60 days' initial departure time after the conclusion of removal proceedings, *see* 8 U.S.C § 1229c(b)(2), the BIA can typically grant only 30 additional days after the termination of an appeal. *See Matter of Chouliaris*, 16 I. & N. Dec. 168, 170 (BIA 1977) (holding that where the IJ initially granted more than 30 days' departure time and that period had expired, "the respondent will be given 30 days from the date of our decision in which to depart voluntarily."). Therefore, even if an alien files a motion to reopen the day the BIA awards voluntary departure, the agency will have at most 30 days to resolve it. This will be unlikely, given the fact that, as of September 30, 2004, there were 33,544 cases pending appeal before

departure order by leaving the country, his leaving would again constitute withdrawal under § 1003.2(d).

It makes little sense why Congress would codify a right to file a motion to reopen "within 90 days of the date of entry of a final administrative order of removal," § 1229a(c)(7)(C)(i), if, in a substantial number of cases, the order of removal itself would result in forfeiture of the motion. The majority's rule puts Banda-Ortiz in the "untenable position of having to choose between two equally undesirable alternatives." *In re Wilson*, 442 F.3d 872, 878, 2006 WL 574273, at *5 (5th Cir. March 10, 2006).

The result is particularly harsh when one considers that it operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure. To qualify for voluntary departure, one must show, *inter alia*, good moral character for at least five years before applying, and must not be removable for reason of aggravated felony conviction or for security-related reasons. 8 U.S.C. § 1229c(b)(1). Banda-Ortiz, for example, is employed, has never been convicted of a crime, and has two children who are United States citizens. While his removal proceedings were pending on appeal to the BIA, his younger son was born and was diagnosed with reactive airway disease and chronic allergic rhinitis, which in one doctor's opinion would require constant medical attention not available in Mexico.

The only means Banda-Ortiz had to introduce these facts as evidence of "exceptional and extremely unusual hardship" to the child, 8 U.S.C. § 1229b(b)(1), was a motion to reopen,

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the BIA, of which 6,059 had been pending from 2003 or earlier. 2004 EOIR Stat. Y.B. U2.

requesting adjustment of status. This possibility of intervening circumstances is precisely what Congress anticipated when it afforded aliens such as Banda-Ortiz the right to file such a motion.[9]

The panel majority believes it sufficient that its interpretation of the statutes "permit[s] the filing and resolution of a motion to reopen, so long as it does not interfere with the agreed upon voluntary departure date or the Government's interest in the finality of an alien's voluntary departure." But, it cannot accord with due process for the resolution of motions to turn on the happenstance of how quickly an agency can clear its docket during a given thirty-day period.[10] The possibility that two materially similar motions will be treated differently, depending on the extent of administrative backlog at the time of filing, should convince the panel majority that its interpretation leads to absurd results.[11]

Tolling, by contrast, accords with all of Congress's objectives in IIRIRA. It preserves the right of all removable aliens to file a single, good-faith motion to reopen after a

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[9] "A motion to reopen seeks fresh consideration on the basis of newly discovered facts or a change in circumstances since the hearing [.]" Charles Gordon, Stanley Mailman, & Stephen Yale-Lochr, 1-3 Immigration Law and Procedure § 3.05[7][a] (2005). I take no position on whether Banda-Ortiz would ultimately prevail on his claim for adjustment of status.

[10] *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (concluding that state's failure to convene a timely hearing, through no fault of petitioner, violated due process in part because a "system or procedure that deprives persons of their claims in a random manner ... necessarily presents an unjustifiably high risk that meritorious claims will be terminated").

[11] *See United States v. Female Juvenile*, 103 F.3d 14, 16-17 (5th Cir. 1996) ("Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result.").

final adjudicative order of the BIA. It also allows aliens to seek voluntary departure without fear of surrendering other avenues of procedural relief. Finally, it does no damage to Congress's desire to place reasonable limits on the voluntary departure period: The total time initially allotted for departure (and hence the time available to file to reopen) still cannot exceed sixty days, and limiting claimants to one motion to reopen, supported by evidence of newly-discovered facts, will temper the frequency and duration of tolling.

II.

The panel majority resists this conclusion in part because it believes we lack jurisdiction to toll the voluntary departure period. It cites four cases for this proposition, three of which hail from circuits that have since accepted the position advanced by Banda-Ortiz. *See Reynoso-Lopez*, 369 F.3d at 280; *Zazueta-Carrillo*, 322 F.3d at 1172-73; *Garcia*, 368 F.3d at 1159. The remaining case, *Ngarurih*, 371 F.3d at 194, does not require a different result here.

The court in *Ngarurih* held that it lacked authority to reinstate, or in the alternative, stay the voluntary departure period pending appeal. *Id.* at 193-94. The court noted, however, that the "most fundamental[ ]" reason for holding that it lacked jurisdiction was that, under 8 U.S.C. § 1252, the court could continue to hear the merits of a petition for review even after the alien had left the country. *See id.* at 192-93. Therefore, "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States, and there is no longer any prospect that the government could manipulate voluntary departure orders to deprive an alien of judicial review." *Id.*

Here, however, the government has offered no similar safeguard to provide that an alien can have his motion to reopen heard on the merits if he leaves the United States. In fact, it is undisputed that, if Banda-Ortiz had left the country pursuant to his voluntary departure order, he would have

automatically forfeited his motion under § 1003.2(d). Ngarurih, by contrast, received full consideration of his asylum application, notwithstanding that he overstayed his departure period. *Id.* at 188-91. I would merely ask the court to extend the same courtesy to a petitioner filing a motion to reopen.[12]

The panel majority also believes we cannot toll because tolling contravenes the text of § 1229c(b)(2), which provides that "[p]ermission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days," and 8 C.F.R. § 1240.26(f), which vests sole jurisdiction "to extend the time in which to depart voluntarily" in specific executive officials. Although I admire the majority's attention to statutory and regulatory text, a strict reading of these provisions proves both too much and too little in this case.

It proves too much because it calls into question a longstanding practice of the agency that the majority cannot intend to assail-the tolling of the voluntary departure period pending appeal to the BIA.[13] If the voluntary departure period cannot exceed sixty days under any circumstance, an alien would risk more than a motion to reopen when he elects voluntary departure; he would also put in jeopardy his right to any review of the IJ's decision.[14]

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[12] *But see* 8 U.S.C. § 1229c(d)(1)(B) (preventing aliens from receiving certain forms of relief for ten years after overstaying the voluntary departure period, but not including an appeal of an asylum application).

[13] *See Matter of Villegas Aguirre*, 13 I. & N. Dec. 139, 140, 1969 WL 16928 (BIA 1969) (holding that a timely appeal "tolls the running of the voluntary departure authorization"); *Matter of Chouliaris*, 16 I. & N. Dec. at 170 (affirming *Aguirre* to the extent that a "grant of voluntary departure made by an immigration judge shall not be jeopardized by taking an appeal"). This practice strongly suggests that tolling does not constitute "exten[tion]" within the meaning of § 1240.26(f).

[14] For example, Banda-Ortiz received 60 days' voluntary departure from the IJ on February 23, 2001 (until April 24). He timely appealed on

It proves too little because we cannot avoid doing some damage to statutory text in this case, because we are faced with conflicting legislative commands. As I have explained, the language of § 1229a(c)(7) is intentionally broad; it does not make exception for aliens subject to voluntary departure and, in fact, it contemplates that any alien facing removal may file a motion to reopen. Therefore, the panel majority's decision carves out an exception to the motion-to-reopen statute that its text cannot bear.

Even if Banda-Ortiz could not muster strong textual arguments, the majority's reading of § 1229c(b)(2) would be unpersuasive. It is not enough to defeat an argument for tolling to point out that tolling would undermine the statutory text. It is in the very *nature* of tolling to suspend the period of time provided by statute for certain actions, when the circumstances of the case require. In fact, the Supreme Court has suggested, at least in the statute of limitations context, that we presume the availability of tolling against the government unless Congress provides otherwise.[15]

March 26, which tolled the departure period. The BIA did not release its opinion affirming the IJ's order, and granting 30 additional days for departure, until August 22, 2002, six months after the IJ's decision.

[15] *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) ("We ... hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so."). Of course, just because tolling is available by statute does not mean that we will ordinarily grant it. *See Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002) (holding that tolling is appropriate in those "rare and exceptional circumstances where it is necessary to preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable") (internal quotations and alteration omitted).

Tolling is particularly appropriate in a case like this, where it is necessary to preserve a statutory right and prevent the creation of a legal Scylla and Charybdis that will inevitably lead to the denial of meritorious claims.[16] For these reasons, I would join those circuits that hold that "suspension of a voluntary departure period merely tolls the running of that period; it does not extend it." *Bocova v. Gonzales*, 412 F.3d 257, 269 (1st Cir. 2005).[17]

As our court encounters an increasing number of immigration cases, we are bound to confront various iterations of the fact pattern before us today, and I have little hope that the mischief caused by this panel majority's decision will be limited only to the specific circumstances involving Banda-Ortiz. One predictable consequence of today's decision, for example, is that the immigration bar will hesitate before requesting voluntary departure because of the now-heightened risk that a successful request will result in the automatic denial of all forms of discretionary relief.

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[16] We recently granted tolling for a federal habeas petitioner who waited until the final day of the limitations period to raise a claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), in a successive habeas corpus petition. *See Wilson*, 442 F.3d 872, 878, 2006 WL 574273, at *6. The court reasoned that the petitioner was justified in waiting for the court to rule on his initial COA application because he lacked an adequate vehicle for his *Atkins* claim. Because of a Texas procedural rule prohibiting concurrent state and federal petitions, he faced the "Hobson's choice" of filing in state court, and dismissing his federal petition (sacrificing review of all his federal claims), or filing concurrently in state and federal court, and defaulting his state petition (but satisfying federal exhaustion requirements). *See id.* at *5. As in *Wilson*, tolling is the only way to provide Banda-Ortiz with an adequate procedural means to assert his claim. *But see id.* at *8 (Garza, J., dissenting) (concluding that equitable tolling, *inter alia*, "disregarded AEDPA's statutory scheme.").

[17] *See also Barroso*, 429 F.3d at 1205-06; *Lopez-Chavez*, 383 F.3d at 653 (holding that § 1240.26(f) does not bind judicial officers).

We might have avoided the problem by deferring to the accumulated wisdom of our sister circuits. Though the majority finds this weight of authority insufficient, it might at least, out of comity, acknowledge the merit of the competing position by applying the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS. v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). This would promote a fair result for aliens facing removal and would preserve a uniform interpretation of the relationship between the statutory provisions governing voluntary departure and motions to reopen. I respectfully dissent.

U.S. Department of Justice
Executive Office for Immigration Review

File: A29 579 258 – El Paso Date: Nov. 9, 2004
In re: SERGIO BANDA-ORTIZ
IN REMOVAL PROCEEDINGS
APPEAL

CHARGE: Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. We affirm the Immigration Judge's May 6, 2003 decision pretermitting the respondent's application for cancellation of removal. An alien granted voluntary departure in removal proceedings who fails to depart voluntarily within the time specified is, by virtue of that failure, rendered ineligible for various forms of relief – including cancellation of removal – for a period of 10 years, provided that the alien was given proper notice that such penalties could result. *See* section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d); 8 C.F.R. § 1240.26(a) (2004). *Cf. also Matter of Shaar*, 211 I&N Dec. 541 (BIA 1996) (holding under prior law that an alien who files a timely motion to reopen during the pendency of a voluntary departure period in order to apply for certain forms of relief from deportation and who subsequently remains in the United States after the scheduled date of departure is statutorily ineligible for the requested relief). We agree with the Immigration Judge that section 240B(d) is applicable to the repondent's case.

On August 22, this Board issued a decision which granted the respondent 30 days in which to depart voluntarily from the United States and which notified him that he would be ineligible for relief under section 240A of the Act, 8 U.S.C. § 1229b, for 10 years if he failed to depart in accordance with the 30-day deadline. The respondent subsequently filed a motion to reopen for the purpose of reapplying for cancellation of removal based on emergent circumstances, and on December 13, 2002, this Board granted the motion despite the fact that the respondent clearly had not departed the United States in compliance with our voluntary departure order. Because section 240B(d) precluded the respondent from demonstrating prima facie eligibility for cancellation of removal as of the expiration date of his voluntary departure period, it is apparent to us that we erred in the Immigration Judge's decision to pertermit the respondent's cancellation of removal application during the remanded proceedings.

Notwithstanding the respondent's appellate argument to the contrary, the filing of a timely motion to reopen does not toll the voluntary departure period or stay the execution of any decision issued in the case. *See Matter of Shaar*, *supra*, at 547. To the extent that the respondent characterizes the application of section 240B(d) to his case as a due process violation, we would simply note that this Board lacks jurisdiction to entertain facial constitutional challenges to the Act. *See Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Finally, although the respondent suggests that his failure to voluntarily depart by the 30 – day deadline was due to "exceptional circumstances" within the meaning of former section 242B(e)(2)(A) of the Act, 8 U.S.C. § 1252b(e)(A)(Supp. V 1993), the "exceptional circumstances" clause of former section 242B(e)(2)(A) did not survive the enactment of current section 240B(d) of the Act. We express

no opinion as to whether the respondent's failure to depart would have been excusable under prior law.

Accordingly, the respondent's appeal is dismissed.

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court
El Paso, Texas

File No: A29 579 258 – El Paso Date: May 6, 2003

In the Matter of SERGIO BANDA-ORTIZ, Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) present without admission

APPLICATIONS: Cancellation of removal under Section 240A(b)(1)

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a thirty-six-year old married male, a native and citizen of Mexico, who was previously found removable from the United States, under an order issued by the Board of Immigration Appeals on August 22, 2002. On December 13, 2002, the Board of Immigration Appeals issued an order re-opening the case and remanding it to the Immigration Court for further proceedings to consider unavailable evidence in support of his application for cancellation of removal under Section 240A(b)(1) of the Act.

The evidence, at least in documentary form, has been presented (Exhibit 6), but I also note that the respondent was required to depart the United States by the Board of Immigration Appeals within thirty days of the date of their order of August 22, 2002. The Court, in its original order, dated February 23, 2001, had provided the respondent with written and oral notification of the consequences of failure to depart when voluntary departure has been granted under

Section 240B(b) of the Act. These consequences were reiterated by the Board of Immigration Appeals in their order of August 22, 2002. The respondent did not depart, however, but rather filed a motion to reopen with the Board of Immigration Appeals that was received by them on September 23, 2002, a period more than thirty days past the date of their order of August 22, 2002. The respondent would, therefore, appear to be barred from further consideration of, and ineligible for, relief under Section 240A of the Immigration and Nationality Act for a period of ten years after his failure to depart.

Counsel for the respondent, after the possible difficulty was noted at the Master docket sitting of the Court in April of 2003, has received a nunc pro tunc extension of voluntary departure from the Government, requiring him to depart on or before September 24, 2002. However, that was done May 5, 2003, well after departure was required, and, in point of fact, the parties have agreed by stipulation that the respondent has not departed the United States, voluntarily or otherwise, at any point subject to the Board's order of August 22, 2002.

The Court is now left with the situation where the respondent's motion was filed within the voluntary departure period, extended nunc pro tunc by the relevant Government office, but was not acted upon by the Board of Immigration Appeals until after the voluntary departure period had expired. The respondent has not presented any evidence that could be sufficient to demonstrate the required exceptional circumstances for failure of himself to depart the United States. I find that the question of a motion to reopen filed within the voluntary departure period, but not acted upon before the departure period had expired, was dealt with in *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996). The Board there held that the bar to various discretionary reliefs did attach where departure was required and was not made even while a motion to reopen was pending. There is no question, then, but that the bar to discretionary relief mandated by the

Congress of the United States for failure to depart voluntarily after requesting permission to do so, did attach to this respondent, either on September 21, 2002, his original departure date, or September 24, 2002, the departure date set by the Government in an order dated May 5, 2003.

The sole remaining question then is whether or not re-opening of the removal proceedings is sufficient to lift the bar. I believe that this would be contrary to Congressional intent and would, in fact, act simply to repeal the bar that attaches for failure to voluntarily depart. The reliefs set forth in the bar, under Sections 240B and 240A, 245, 248, and 249, of the Immigration and Nationality Act, are all after the commencement of proceedings under the jurisdiction of the Immigration Court. The only way that any of these applications could, in fact, be considered would be by way of a motion to re-open the Court proceedings for the purpose of bringing them before the Court, since they are under the Court's jurisdiction. If to simply re-open the proceedings removes the bar, and if for consideration of any of these reliefs, reopening would be necessary in any event, the bar enacted by Congress would become a nullity. I find rather that the more consistent interpretation of the Immigration and Nationality Act would be that the bar attaches upon failure to depart, and whether the proceeding is reopened, either by accident or on purpose subsequently, the various reliefs set forth under the statute would still be unavailable to the respondent. In fact this would be consistent with the whole of the statutory scheme. For instance, a respondent might fail to depart voluntarily, and subsequently obtain reopening of his removal proceeding for a consideration for asylum in the United States based upon sufficiently demonstrated changed circumstances in his country. I do not believe that it would be consistent with Congressional intent to hold that such a reopening would also remove the statutory bar to all other forms of relief that attached when the respondent failed to obey the order of the Court or the Board of Immigration Appeals, but rather that those reliefs

would continue to be unavailable, even were the proceedings subsequently re-opened on other grounds. I find therefore, that the respondent is ineligible and barred from the relief of cancellation of removal under Section 240A(b)(1) of the Act, for failure to depart the United States voluntarily within the time provided for him to do so. Accordingly, the following order must enter.

ORDER

IT IS ORDERED that the application for cancellation of removal under Section 240A(b)(1) of the Act be and is hereby denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico, the country designated by him and the country of his nativity and citizenship, on the charge contained in the Notice to Appear.

GARY BURKHOLDER
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

File: A29 579 258 – El Paso Date: Dec. 13, 2002
In re: BANDA-ORTIZ, SERGIO
IN REMOVAL PROCEEDINGS
MOTION

ORDER:

PER CURIAM. The respondent has now filed a motion to reopen, and the Service has not responded to the motion. The respondent seeks reopening on the basis of new or previously unavailable material evidence in support of his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act. Accordingly, the motion is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion.

U.S. Department of Justice
Executive Office for Immigration Review

File: A29 579 258 – El Paso Date: Aug. 22, 2002
In re: BANDA-ORTIZ, SERGIO
IN REMOVAL PROCEEDINGS
APPEAL

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's Order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.